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Supreme Court, U.S.
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In The

Supreme Court of the United States

HORACE LITTLESUN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, at sentencing, it is appropriate to use testimonial hearsay concerning facts probative of the crime of conviction after *Crawford v. Washington*, 541 U.S. 36 (2004).

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OPINION BELOW

The Ninth Circuit Court of Appeals selected its opinion for publication in the Federal Reporter. The decision is reported at 444 F.3d 1196 and is reprinted in the Appendix at 1-11.

JURISDICTION

The Judgment appealed from is a final criminal sentence. The appellate court had jurisdiction over the final judgment of the District Court under 28 U.S.C. § 1291. The Ninth Circuit filed its decision on April 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Ninth Circuit Court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment to the U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF FACTS

The petitioner, Horace Littlesun, and numerous others were indicted for conspiring to sell and selling methamphetamine on the Northern Cheyenne Indian Reservation in Montana. Their suppliers were several out-of-state codefendants the reservation residents referred to as "the Mexicans."

Horace pled guilty to Counts I and IV of the indictment, taking responsibility for selling only 3.7 grams of methamphetamine to an undercover informant, and specifically denied selling any additional amounts. However, the sentencing court held him responsible for 32.5 grams.

The approximate one ounce difference caused an increase in the sentencing guideline adjustment pursuant to § 2D1.1 and § 2D1.2(a)(2), Drug Offenses Occurring Near Protected Locations, resulting in a base offense level of 23.

Horace objected to the computation of drug amount and base offense level because it was based solely on an interview of his wife, who was also a codefendant, by a Bureau of Indian Affairs agent. The wife did not testify at sentencing; however, the BIA agent testified as to what she had told him.

Over the petitioner's Confrontation Clause objection, the judge concluded all he needed was "some particularized guarantee of trustworthiness" rather than confrontation and cross-examination of Horace's wife. (App. 5).

The agent testified that the wife had told him that "the Mexicans" had fronted an ounce to her husband; that she and her husband were selling grams for $100 and

smaller bindles for $25. She also told the agent that Horace collected debts and wired money to "the Mexicans" and allowed them to stay at his house. The interview took place during execution of a search warrant at the Littlesun residence. Horace's wife talked to the agent but he did not. She refused to disclose her customers, but said Horace used a gram each day, which would supply an alternative path for the meth fronted. (App. 5). The agent also admitted that the 3.7 gram amount was not purchased from the Littlesun residence, but from another residence on the same cul-de-sac. (Sent. Tr. pp. 37, 38).

Horace denied the ounce was fronted to him or sold to him, and denied collecting debts for "the Mexicans." He testified he only sold the 3.7 grams when the informant came to his house and asked for his wife, and the wife and informant told him to go to the neighbor's house and bring back the drugs. (App. 5).

Furthermore, Horace had moved out of his home and was staying at his sister's house in Busby, Montana, during the first three months of 2003. During that time, he was "stepping out" on his wife with another woman, and she was angry at him for it. Although he moved back home just before the 3.7 gram sale, they were "still having [their] feud." (App. 4). This was not the first one, as she had previously stabbed him. (App. 5).

The sentencing judge found that the ounce was fronted to Littlesun and that he sold it, disbelieving Littlesun and accepting the wife's out-of-court statement to the BIA agent. Littlesun got 33 months to serve; his wife got only 18. (App. 6).

REASONS FOR GRANTING THE PETITION

The circuit courts which addressed the issue could not consider the applicability of *Crawford v. Washington*, 541 U.S. 36 (2004) at sentencing because *Crawford* did not overrule *Williams v. New York*, 337 U.S. 241 (1949). Post-*Williams* decisional law allows confrontation at revocation of probation and parole, yet not at the hearing which imposed such a sentence.

At sentencing, testimonial hearsay concerning facts of the offense of conviction must be subject to the Confrontation Clause. The Court should narrow the scope of *Williams*.

ARGUMENT

This petition presents this Court with an opportunity to review the scope of the holding in *Williams v. New York*, 337 U.S. 241 (1949), allowing the admission of hearsay evidence at sentencing.

In *Williams*, "a jury had recommended life imprisonment for a murderer but the judge imposed a death sentence because the presentence investigation revealed additional aggravating evidence that the jury had not heard." (App. 6-7).

As the *Littlesun* panel stated, "[w]hen *Williams* was decided in 1949, presentence reports had just begun to be considered." (App. 7). The *Williams* opinion speaks to the necessity for plenary consideration by the judge of sentencing information concerning the background and character of a person convicted of an offense. This information could not be appropriately submitted to a jury considering guilt or innocence.

In *Crawford*, the Supreme Court reversed a conviction for assault due to the admission of out-of-court statements made by the defendant's wife. The court ruled that the use of these statements violated the Confrontation Clause because, where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is confrontation.

The issue raised in this case was foreshadowed by Justice Breyer, joined by Justice O'Connor, in his dissent in *Blakely v. Washington*, 542 U.S. 296 (2004):

> (3) What, then, are the evidentiary rules? Can the prosecution continue to use, say presentence reports, with their conclusions reflecting layers of hearsay? Cf. *Crawford v. Washington* (citation omitted) (clarifying the Sixth Amendment's requirement of confrontation with respect to testimonial hearsay).

Blakely at p. 346.

The Ninth Circuit Court held only that sentencing hearsay . . . "be accompanied by some minimal indicia of reliability," quoting *United States v. Berry*, 258 F3d 971, 976 at fn. 9 (9th Cir. 2001) (App. 8) and that the court satisfied the criterion by personal observation of Littlesun's demeanor, wire transfers and what he perceived as testimonial inconsistencies. (App 8). The Court held that "*Crawford* speaks to trial testimony, not sentencing" *Id.*

Nonetheless, the Court's treatment of Littlesun's plight was sympathetic:

> . . . there can be no question that Littlesun's wife's testimony is testimonial if *Crawford* applies to sentencing. And the record is clear that Littlesun never had an opportunity to cross-examine

> his wife about what she said. Cross examination might have been productive, because her participation in the methamphetamine conspiracy and her own interest in lenience, her boyfriend among "the Mexicans," his girlfriend, and the prior occasion when she stabbed Littlesun all might have given rise to an inference that she was not telling the truth when she cast the blame on her husband for the additional ounce.

United States v. Littlesun, 444 F.3d 1196, 1199-1200 (9th Cir. 2006) (App. 8).

The Court held that it was bound by *Williams*:

> But it is not for us to overrule the Supreme Court's decision in *Williams*. Under *Agostini v. Felton*, we are bound to apply controlling Supreme Court precedent until it is explicitly overruled by that Court. And *Crawford* does not explicitly overrule *Williams*. Thus the law on hearsay at sentencing is still what it was before *Crawford*: hearsay is admissible at sentencing, so long as it is accompanied by some minimal indicia of reliability."

Id. at 1200 (App. 9).

The New York statute at issue in *Williams*, however, was not challenged under the Sixth Amendment's right to confrontation but rather under the Due Process Clause of the Fourteenth Amendment. *Id.* at 337 U.S. 245. The Fourteenth Amendment contains no explicit right to confront witnesses; the Sixth specifically guarantees this right in all "criminal proceedings."

This petition does not seek a blanket prohibition on hearsay at sentencing. What petitioner seeks is a recognition that facts concerning the actual crime charged,

whether presented at trial or at sentencing, be presented under the protections of the Confrontation Clause. No other petitioner has presented this issue in this context.

Such a rule would not preclude, for example, presentation of a defendant's prior drug convictions at sentencing, or even his drug abuse history. Those facts relate to him as an individual, consonant with modern penology principles.

But information about the facts of the instant offense, such as drug quantity, would come under this rubric. The fact finding function of the judge at sentencing is no different than that of the jury (or judge in a bench trial) in the trial context. What the defendant did is a different question than who he is.

Thus, *stare decisis* precluded the appellate court and others from considering this case in a way that would have resulted in a conflict between the circuits; no circuit *could* decide the case differently than *Williams*.

This Court suffers from no such infirmity.

In *Agostini v. Felton*, 521 U.S. 203 (1997) this Court recognized *stare decisis* does not preclude recognition of a sea change in the law, allowing the court to overrule earlier precedents inconsistent with more recent decisions.

The policy behind *stare decisis* is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." (Internal citations omitted) ("The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law"). *Id.* at 235.

Thus, in several cases this Court has held that *stare decisis* does not prevent overruling a previous decision where there has been a significant change in, or subsequent development of, constitutional law. *Id.*, at 235-236 citing *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Significantly, "*stare decisis* may yield where a prior decision's 'underpinnings [have been] eroded, by subsequent decisions of this Court.' " *Alabama v. Smith*, 490 U.S. 794, 803 (1989).

Later decisions of this Court qualify the broad mandate of *Williams* allowing "hearsay" at sentencing. For example, in proceedings arising out of revocation of probation or parole, *Morrissey v. Brewer*, 408 U.S. 471 (1972), this Court held that "this right to confrontation ensures that a finding of a supervised release violation will be based on verified facts." *United States v. Comito*, 177 F.3d 1166, 1170 (9th Cir. 1999) See also, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation). Proceedings for revocation of parole or probation, if consummated, involve resentencing the defendant. It is an anomaly for the revocation of a sentence to require confrontation but not for the sentence itself.

In *United States v. Booker*, 543 U.S. 220 (2005) this Court held the United States Sentencing Guidelines Manual violated the Sixth Amendment by requiring judges to enhance sentences beyond the maximum sentence authorized by the facts established by a plea of guilty or a jury verdict. In *Blakely*, *supra*, this Court held that the Sixth Amendment was violated when it was enhanced by a judge when he considered facts arising out of the offense but not submitted to a jury. Both these cases involved the recognition that the Sixth Amendment applies at sentencing; both involved facts of the offense of conviction.

The Sixth Amendment's right to confrontation should apply equally to the proof of any of the facts that cause a sentence to be increased, arising out of the case of conviction.

CONCLUSION

The Court should grant the petition for a writ of certiorari, set the case for oral argument, and address the viability and extent of *Williams v. New York* after *Crawford.*

Dated this 19th day of July, 2006 at Bozeman, Montana.

Respectfully submitted,

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444 F.3d 1196

United States Court of Appeals, Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Horace LITTLESUN, Defendant-Appellant.
No. 04-30300.

Argued and Submitted Sept. 12, 2005.
Filed April 21, 2006.

Larry Jent, Williams & Jent, PLLP, Bozeman, MT, for appellant **Horace Littlesun**.

Marcia Hurd, Assistant U.S. Attorney, District of Montana, for appellee **United States** of America.

Appeal from the **United States** District Court for the District of Montana; Richard F. Cebull, District Judge, Presiding. D.C. No. CR-03-00080-RFC.

Before: BROWNING, ALARCÓN, and KLEINFELD, Circuit Judges.

KLEINFELD, Circuit Judge:

We publish this opinion to resolve whether, after *Crawford v. Washington,* it is appropriate to use hearsay testimony during sentencing. We join each of our sister circuits who have considered the issue in concluding that it is.

FACTS

Horace Littlesun, his wife, and numerous others conspired to sell and sold methamphetamine on the Northern Cheyenne Indian Reservation in Montana. Their inventory came from several out-of-state individuals the reservation residents called "the Mexicans."

Littlesun pled guilty to selling 3.7 grams of methamphetamine to an undercover informant,[1] but the sentencing judge held him accountable for 32.5 grams. The approximate one ounce difference generated a guideline adjustment that lengthened **Littlesun's** sentence. **Littlesun's** wife had told a Bureau of Indian Affairs agent that her husband had sold the additional ounce, but she did not testify at **Littlesun's** sentencing hearing. The BIA agent who interviewed her testified to what she had told him. The sentencing judge believed the agent and imposed the quantity adjustment accordingly. **Littlesun** was also denied a downward adjustment for minor or minimal role in the conspiracy, partly on the basis of what his wife had told the agent.

The sentencing judge considered the defense's confrontation clause objection to the BIA agent's testimony and overruled it, concluding that all that he needed was "some particularized guarantee of trustworthiness" rather than confrontation and cross-examination of Littlesun's wife. The agent testified that the wife had told him that "the Mexicans" had fronted an ounce to her husband in February 2003 for a price of $1,500.[2] She and her husband were selling grams for $100 and smaller "bindles" for $25. Her husband also collected debts for "the Mexicans," wired money to them, and permitted them to stay at his house on their trips to the reservation.

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[1] Conspiracy to distribute methamphetamine within 1,000 feet of the Northern Cheyenne federal housing project in violation of 21 U.S.C. §§ 841(a)(1), 860, & 846, and distributing less than 50 grams of methamphetamine within 1,000 feet of the Northern Cheyenne federal housing project.

[2] To front drugs is to advance the inventory to a dealer on credit.

When the investigation broke open, Littlesun's wife talked to the investigators but he did not. She refused to disclose who her customers were, but said that her husband used a gram of methamphetamine himself every few days, which would offer an alternative path for the disappearance of the ounce he was fronted.

Littlesun testified that one of the Mexicans was "making a move" on his wife, and "[t]hey must have fell in love or something," so he moved out to his sister's and was staying with her in Busby, Montana, during the first three months of 2003. During that period he was "stepping out" on his wife with another woman, and she was angry at him for it. But he had moved back home a couple of days before the March sale of 3.7 grams to the undercover agent, though they were "still having [their] feud." (This was not their first tiff – the presentence report says that the wife had stabbed him several years before.) He denied selling the ounce, denied it was fronted to him, and denied collecting debts for "the Mexicans." He testified that he only sold the 4 grams when the informant came to his house and asked for his wife, and the wife and informant told him to go to the neighbor's at the end of the cul-de-sac and bring back the drugs for her deal.

On cross-examination, Littlesun admitted that he wired $711 to someone in Utah on December 14, 2002, and $921 to one of his co-defendants on January 5, 2003. He knew at the time that the money was drug trafficking proceeds and that there was a drug conspiracy going on, but said his wife "had her own thing going."

The district judge was hearing this case after *Blakley*[3] and before *Booker*,[4] so he applied a "beyond a reasonable doubt" standard at sentencing. The judge did not impose an upward adjustment to **Littlesun's** guideline calculation for wiring the money, but considered the money transfers in determining whether **Littlesun** was telling the truth about the ounce. He found beyond a reasonable doubt that **Littlesun** knew about the conspiracy, though he did not adjust the sentence to reflect the 210 gram amount charged to the conspiracy in Count I of the indictment. Despite **Littlesun's** denial, the sentencing judge found beyond a reasonable doubt that the ounce was fronted to **Littlesun** and that he sold it. The sentencing judge disbelieved **Littlesun** because he denied personal involvement with the conspiracy even while "the Mexicans" lived in his house and he wired money to them. So he accepted the wife's out-of-court statement to the BIA agent. As a result, **Littlesun** got 33 months to serve even though he had no significant criminal history. His wife got only 18 months.

ANALYSIS

A. Hearsay at Sentencing

The Supreme Court held in *Williams v. New York*[5] that admission of hearsay evidence at sentencing did not violate the due process clause. In that case, a jury had

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[3] *Blakely v. Washington*, 542 U.S. 961, 124 S.Ct. 21, 159 L.Ed.2d 851 (2004).

[4] *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

[5] *Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

recommended life imprisonment for a murderer but the judge imposed a death sentence because the presentence investigation revealed additional aggravating evidence that the jury had not heard. The Court explained that, both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.[6]

This may include affidavits and, in smaller communities, the judge's own knowledge. When *Williams* was decided in 1949, presentence reports had just begun to be considered, the Court noted, to implement "a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime," so that the death sentence was no longer "an automatic and commonplace result of convictions."[7] Individualization of sentences made it especially necessary to review a broad range of sentencing information that was not appropriately submitted to juries considering guilt.

Congress has since provided by statute that the hearsay rule and other evidentiary limitations do not apply to sentencing:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United

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[6] *Id.* at 246, 69 S.Ct. 1079.

[7] *Id.* at 247.

States may receive and consider for the purpose of imposing an appropriate sentence.[8]

We require only that the testimony "be accompanied by some minimal indicia of reliability."[9] In this case, that criterion is plainly satisfied by the judge's personal observation of the defendant's demeanor during his testimony, the wire transfers and their significance, and testimonial inconsistencies noted by the sentencing judge.

Littlesun argues that these longstanding principles have been implicitly overruled and that the Supreme Court's decision in *Crawford v. Washington*[10] requires that the Confrontation Clause be interpreted to exclude hearsay at sentencing. But *Crawford* does not expressly speak to sentencing. It holds that, with the possible exception of dying declarations, the Confrontation Clause demands two things for admissibility of testimonial hearsay *at trial*: unavailability of the witness and prior opportunity for cross-examination.[11] *Crawford* speaks to trial testimony, not sentencing.

Littlesun's argument nevertheless has some force. Though the meaning of "testimonial" in *Crawford* is not entirely clear, there can be no question that **Littlesun's** wife's testimony is testimonial if *Crawford* applies to

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[8] 18 U.S.C. § 3661.

[9] *United States v. Berry*, 258 F.3d 971, 976 (9th Cir.2001) (internal quotations omitted).

[10] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[11] *Id.* at 63-64, 68-69, 124 S.Ct. 1354 (overruling the "particularized guarantees of trustworthiness" test in *Ohio v. Roberts* to the extent it is inconsistent with *Crawford*).

sentencing. And the record is clear that **Littlesun** never had an opportunity to cross-examine his wife about what she said. Cross examination might have been productive, because her participation in the methamphetamine conspiracy and her own interest in lenience, her boyfriend among "the Mexicans," his girlfriend, and the prior occasion when she stabbed Littlesun all might have given rise to an inference that she was not telling the truth when she cast the blame on her husband for the additional ounce.

But it is not for us to overrule the Supreme Court's decision in *Williams.* Under *Agostini v. Felton,*[12] we are bound to apply controlling Supreme Court precedent until it is explicitly overruled by that Court.[13] And *Crawford* does not explicitly overrule *Williams.* Thus the law on hearsay at sentencing is still what it was before *Crawford:* hearsay is admissible at sentencing, so long as it is "accompanied by some minimal indicia of reliability."[14]

The same conclusion has been reached by the First, Second, Sixth, Seventh, Eighth, and Eleventh Circuits,[15]

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[12] *Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (internal citation omitted)).

[13] *United States v. Weiland,* 420 F.3d 1062, 1079 n. 16 (9th Cir.2005).

[14] *United States v. Berry,* 258 F.3d 971, 976 (9th Cir.2001) (internal quotations omitted).

[15] *See, e.g., United States v. Luciano,* 414 F.3d 174, 179 (1st Cir.2005); *see also United States v. Martinez,* 413 F.3d 239, 242 (2d Cir.2005); *United States v. Stone,* 432 F.3d 651, 654 (6th Cir.2005); *United States v. Roche,* 415 F.3d 614, 618 (7th Cir.2005); *United States*

(Continued on following page)

and none of our sister circuits have reached a contrary conclusion. And we have previously held that "[f]ederal law is clear that a judge may consider hearsay information in sentencing a defendant."[16]

Littlesun counters with our decisions in *United States v. Comito*[17] and *United States v. Martin*,[18] but those cases involved revocation of parole and supervised release, not sentencing. Those decisions were grounded in the Supreme Court's decision in *Morrissey v. Brewer*[19] which expressly held that a parolee is entitled to cross-examine witnesses at a revocation proceeding,[20] subject to balancing certain factors. That requirement has since been codified in the Federal Rules of Criminal Procedure,[21] but neither *Morrissey* nor the Federal Rules of Criminal Procedure say anything about *Williams* or the right to examine adverse witnesses at sentencing. A court is presented with quite a different set of circumstances when it has to decide *whether* someone is guilty and must go to prison than when it is deciding *how long* a convicted criminal must serve. We rejected an attempt to graft *Crawford's* Sixth Amendment rule onto *Morrissey's* Due Process requirement at revocation proceedings in our recent decision in

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v. Brown, 430 F.3d 942, 944 (8th Cir.2005); *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir.2005).

[16] *United States v. Fernandez-Vidana*, 857 F.2d 673, 675 (9th Cir.1988).

[17] *United States v. Comito*, 177 F.3d 1166, 1172 (9th Cir.1999).

[18] *United States v. Martin*, 984 F.2d 308 (9th Cir.1993).

[19] *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

[20] *Id.* at 488-89, 92 S.Ct. 2593.

[21] *See* Fed. R.Crim. Proc. 32.1(b)(2)(C).

United States v. Hall.[22] *United States v. Corral*[23] holds that reversal is necessary where the sentencing judge relies on what was concededly unreliable hearsay.[24] It does not hold that accomplice hearsay is unreliable even where there are sufficient indicia of reliability. The government conceded on appeal in *Corral* that the hearsay was unreliable, but had not done so at sentencing.[25] *Corral* expressly recognizes that hearsay is admissible at sentencing.[26] The reliability of Littlesun's wife's hearsay might have become doubtful because she was an accomplice with a penal interest and had demonstrated her hostility to her husband, but the wire transfers and inconsistencies the district court noted were significant indicia corroborating Littlesun's role.[27]

B. Minor or Minimal Participant

Littlesun also challenges the district court's denial of a downward adjustment because he was a minimal or minor participant in the conspiracy.[28] Much of his argument is that

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[22] *United States v. Hall*, 419 F.3d 980, 985 (9th Cir.2005).

[23] *United States v. Corral*, 172 F.3d 714 (9th Cir.1999).

[24] *See id.* at 715.

[25] *See id.* (Explaining that the government conceded that the hearsay in that case "was not reliable enough to be used.").

[26] *See id.* at 716 (Explaining that the sentencing "judge was correct that hearsay is admissible in sentencing. . . . ").

[27] Littlesun also relies on *United States v. Mezas de Jesus*, 217 F.3d 638 (9th Cir.2000), but it does not hold that hearsay or accomplice testimony are inadmissible at sentencing. Rather, it holds that the clear and convincing standard of proof should have been applied where an uncharged offense had an extremely disproportionate effect on the sentence relative to the offense of conviction. *See id.* at 642-43.

[28] U.S.S.G. § 3B1.2.

the conspiracy sold a lot more methamphetamine than he participated in, but the judge took this into account in attributing to Littlesun only 32.5 grams, not the 210 grams the indictment charged. The district judge relied on Littlesun's wife's statement, as well other material in the presentence report to conclude that he had "a smaller role than some others in the conspiracy, but it was by no means small enough" for a role adjustment. We review denial of a role adjustment for clear error,[29] and there was none because the court accepted the evidence of Littlesun's wife's statement.

The district court's determination that hearsay was admissible at sentencing and its guideline calculation were each correct. However, we grant a limited remand to allow the district court to answer the question whether it would have imposed a different sentence had it viewed the Guidelines as advisory.[30]

AFFIRMED in part and REMANDED.

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[29] *See United States v. Pena-Gutierrez*, 222 F.3d 1080, 1091 (9th Cir.2000) (Explaining that a "district court's determination that the defendant was not a minor participant in the offense is a factual determination that we review for clear error.").

[30] *United States v. Ameline*, 409 F.3d 1073, 1079 (9th Cir.2005) (en banc).